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[APPELLATE CIVIL JURISDICTION]
HUGGARD, C.J., THOMAS, C.J.
(F.M.S.) THORNE, J.
June 21, 1934.

IN THE ESTATE OF VANENA KATHA PILLAY MARICAN, Deceased

[SINGAPORE CIVIL APPEAL No. 1 of 1934]

Practice—Grant of administration—Petition by Official Assignee—Circumstances in which grant may be made to Official Assignee—Civil Procedure Code, S. 857.

The Official Assignee more than 6 months after the death of a deceased, applied under section 857 of the Civil Procedure Code for letters of administration to the deceased's estate. At the hearing of his application a caveator appeared and propounded a Will under which the caveator and another were appointed executors. The Will was duly proved.

Held, (reversing an Order of Mills, J.) that there was no jurisdiction, except on sufficient grounds which in this case did not exist, for passing over the executors and making a grant of letters of administration with the Will annexed to the Official Assignee, and that the caveator was entitled to a grant of probate leave being reserved to the other executor to come in and prove.

Per Huggard, C.J. and Thorne, J.: The Court has no jurisdiction even after the lapse of 6 months from the deceased's death, to make any grant of letters of administration under section 857 of the Civil Procedure Code so long as there is a pending application for probate by an executor or for letters of administration by a next-of-kin.

Appeal from the order of Mills, J. dated the 28th February, 1934.

The abovenamed deceased died on the 26th January, 1930. No application for representation to the deceased's Estate was made to the Court until the 11th day of January, 1934, when the Official Assignee filed a petition under section 857 of the Civil Procedure Code praying for Letters of Administration to be granted to him on the ground that six months had elapsed from the date of the decease and that no application for probate or letters of administration had been made to Court. On the 22nd day of February, 1934, one Vavena Mohamed Naina Maricar entered a caveat, and alleged that the deceased had left a Will in India. The Court adjourned the hearing to enable this Will to be produced. Upon the hearing being resumed the caveator produced and propounded the Will under which he and another person were appointed executors. Mills, J. before whom the petition was heard pronounced the Will to be valid but notwithstanding the appointment of executors therein, granted Letters of Administration with Will annexed to the Official Assignee. Against this Order the caveator appealed.

Cobbett for the Caveator (Appellant).

Smith for the Official Assignee (Respondent).

The arguments of Counsel appear sufficiently from the Judgment of Huggard, C.J. below. The appeal was heard before Huggard, C.J., Thomas, C.J. (F.M.S.) and Thorne, J. on the 18th of June, 1934.

Cur. Ad. Vult.

HUGGARD, C.J.—This was a Petition by the Official Assignee under section 857 of the Civil Procedure Code for the grant to him of letters of administration to the estate and effects of the deceased on the ground that more than six months had expired from the date of the death of the deceased and no application for probate or letters of administration had been made.

The deceased died on the 26th day of January, 1930.

During the hearing of the Petition it was suggested by the person cited that the deceased had left a will which was in India, and an adjournment of some weeks was granted to enable the will, if any, to be produced. Subsequently a caveat was entered by one Vavena Mohamed Naina Maricar, and when the hearing of the Petition was resumed this person produced and propounded a Will which was alleged to be the last Will of the deceased. Under this Will the caveator and Vavana Gulam Mohaideen Saiboo Maricar (brothers of the deceased) were appointed executors. Evidence was then given as to the due execution of the Will, and the caveator asked, through his Counsel, that probate of this Will should be granted to him and that the Petition of the Official Assignee should be rejected.

By Order dated the 28th February, 1934, the learned Judge in the Court below pronounced that the said Will had been duly executed according to law, but, notwithstanding the appointment of executors therein, ordered that letters of administration with the will annexed be granted to the Official Assignee.

From that Order the caveator has appealed to this Court.

It is contended on behalf of the Appellant that:—

(1) In view of the fact that application for probate had been made, the Court below had no jurisdiction to appoint the Official Assignee under section 857 of the Civil Procedure Code; and

(2) Even if the Court had jurisdiction the Court was wrong, in the circumstances of the present case, in passing over the rights of an executor.

In regard to the first contention I think it is correct to say that there is no power to grant letters of administration to the Official Assignee or anyone else under section 857 so long as there is application for probate actively pending. In other words, if application for probate has been

made, that application must be disposed of—that is to say, it must have been withdrawn or not proceeded with or refused—before the Court can properly make an appointment under section 857.

In the present case there was no actual application for probate or letters of administration in existence when the Official Assignee filed his Petition, but, as stated earlier in this Judgment, a Will was produced during the hearing of the Petition and one of the executors appointed thereunder asked that probate should be granted to him. It seems clear from the Record that the learned Judge in the Court below then proceeded to deal with the matter as if a formal application for probate had been made. He pronounced in favour of the Will but ordered that letters of administration with the Will annexed should be granted to the Official Assignee. In effect, therefore, the learned Judge rejected the executor's application for probate and he then proceeded to grant letters of administration with the Will annexed to the Official Assignee under section 857. According to my interpretation of that section, as indicated above, I think that the Court below, having disposed of the application for probate, clearly had jurisdiction to make the appointment under section 857.

I now come to the Appellant's second contention, namely, that assuming that the Court below *had* jurisdiction to appoint the Official Assignee, the Court was wrong, in the circumstances of the present case, in passing over the executor.

Unfortunately, owing to the fact that the learned Judge who heard the Petition proceeded on leave immediately after the conclusion of the hearing, it was not possible to obtain his Grounds of Judgment, and this Court has to deal with the matter without knowing exactly what considerations influenced the learned Judge in passing over the executor. I have, therefore, to come to the best conclusion I can upon the evidence given before the learned Judge, and having carefully examined that evidence I do not feel satisfied that it discloses any sufficient grounds for rejecting the caveator's application for probate. There is no evidence whatever that the caveator had knowledge, until the Will arrived in Singapore in January last, that he had been appointed executor, so that he cannot properly be accused of having been dilatory in applying for probate. Nor, in my opinion, is there any sufficient evidence of unsuitability which would justify the Court in overriding the express wishes of the testator and declining to grant probate to the caveator.

I would therefore allow this appeal. I think that the Order of the Court below, so far as it directs that letters of administration with the Will annexed should be granted to the Official Assignee, should be varied, and probate should be granted to the caveator with leave to the second executor to come in.

I think that the Appellant and the Respondent should have their costs of this appeal, to be taxed as between solicitor and client and paid out of the estate.

THOMAS, C.J., (F.M.S.)—I have had the advantage of reading the judgment of the learned President. I agree with the conclusion at which he has arrived, viz: that this appeal should be allowed and that the order of the Court below, so far as it directs that letters of administration with the will annexed should be granted to the Official Assignee should be varied, and that probate should be granted to the caveator with leave to the second executor to come in.

I would wish only to add a few words as to my views on the construction of section 857 of the Civil Procedure Code. These are that where there has been no application either for probate or for administration within six months of the decease of the person whose property is to be administered, or even where there has been an application within that period but such application has been withdrawn or not proceeded with or refused whether within or after the period of six months from the decease, then provided the period of six months has elapsed, the Official Assignee may apply for letters of administration and the Court may appoint him to administer the estate.

On such an application being made it will be the duty of the Court to consider the objection of any other applicant or of any person cited and make such order as may be deemed right under all the circumstances.

In considering the application of the Official Assignee and in making an order thereon, the Court will not be bound by the rules relating to the passing over of an executor or by the rules relating to the priorities of rights of persons entitled to make an application.

In the present case I am satisfied from the evidence that the objections of the caveator showed sufficient reasons for not passing him and his co-executor over.

THORNE, J.—I also have had the advantage of reading the judgment of the learned President of the Court. But for the fact that there is a divergence of opinion among the members of this Court as to the true interpretation of the provisions of Section 857 of the Civil Procedure Code I should have contented myself with an expression

of my entire concurrence in that Judgment. However this divergence of opinion appears and I think it right I should state my view of the true interpretation of that Section.

But for the passing of Section 857 the Official Assignee would have no power to apply, nor the Court any power to accede to the application of the Official Assignee, for a Grant to him of representation to the estate of a deceased person because as such the Official Assignee would have no *locus standi* to make the application. That Section is intended to make provision for the case of persons dying in this Colony many thousands of miles distant from their homes and families, and therefore from their next-of-kin, or where for some such reason no person is resident in the Colony who can apply to the Court for a Grant of Probate or Letters of Administration to the estate of the deceased.

The Legislature therefore thought fit to confer upon the Official Assignee power to apply to the Court, and upon the Court power to make a Grant to him of the appropriate representation to the estate of such a deceased person but only under certain circumstances.

These circumstances, as I read the Section, are, (1) that the Official Assignee cannot make his application until after a period of six months has expired since the death of the deceased, and (2) that no application for a Grant by an executor or next-of-kin, as the case may be, is impending in the Court either at the time of the application by the Official Assignee, or before his application has been disposed of.

If it appears that some person is applying to the Court for a Grant of Probate of the will of the deceased, or of Letters of Administration to his estate, the Court has no power to grant the application of the Official Assignee until the Executor's petition for Probate, or the petition of the next-of-kin for Letters of Administration has first been refused, or withdrawn, or the Petitioner has failed to proceed with his Petition.

I regard this Section as having been passed for the protection of the estates of deceased persons, and the creditors of and beneficiaries in those estates, and not as limiting or restricting in any way the rights of Executors or next-of-kin.

As to the second matter raised, I entirely agree with the learned President of the Court that the order should be reversed, and that Probate should be committed to the Caveator.

Order accordingly.

Solicitors for the Appellant—
Rodyk & Davidson.

Solicitors for the Respondent—
Donaldson & Burkinshaw.

[ORIGINAL CIVIL JURISDICTION]

HUGGARD, C.J.
July 19, 1934.

N. N. SOCKALINGAM CHETTIAR *alias* N. N. S. SOCKALINGAM CHETTIAR...Plaintiff

v.

A. R. S. P. PALANIAPPA CHETTIAR.....Defendant

[SINGAPORE SUIT No. 642 of 1933]

Limitation of suits—Money deposited—Repayable on demand—Banker and customer—Starting point of period of limitation—Ordinance No. 56 (Limitation), Arts 41 & 42—Account stated—Right to sue.

Where two different sums of money were placed in the hands of a Chettiar banker, one on deposit ("thavanai") and the other on current account, on the terms that in the first case the money should be repayable on demand at any time after the expiry of the first three months from the date of the deposit, and that in the other case the amount should be repayable on demand, in a suit for the recovery of both amounts, long after the expiry of the first three months of the deposit account,

Held, that the claim in each case is for money deposited under an agreement that it shall be payable on demand and comes within the purview of Article 42 in the Schedule to Ordinance No. 56 (Limitation) and that the time from which the period of limitation begins to run is the date when the demand for payment is made.

The word "deposit" in Article 42 covers the case of money placed in the custody of a banker by his customer and does not necessarily imply the existence of any fiduciary relationship between the parties.

The plaintiff opened an account with a Chettiar firm in the name of his sister by depositing therein his own money intending it for her maintenance and support. He drew on the account from time to time for her benefit but before the money was exhausted she died,

Held, the balance of the money in the account was the property of the plaintiff, who was entitled to sue for it.

Trial of an action before Huggard, C.J. on the 12th, 13th, 27th, 28th and 29th June and the 3rd July, 1934.

The facts of the case are sufficiently set out in the Judgment below.

Koek for the defendant: The money standing in the account of Seethai Achi, the plaintiff's sister, was her property and after her death only her legal personal representative can sue or give a good discharge for it. There can be no novation in the absence of her legal personal representative so as to entitle the plaintiff to sue. With regard to the defence of limitation, the relationship of banker and customer is that of debtor and creditor: *Foley* v. *Hill*, 2 H.L.C. 28; *Pott* v. *Clegg*, 16 M. & W. 321. Indian article 60 before amendment in 1908, corresponded to our article 42, and prior to such amendment it was held in India that a claim for money placed with a native banker was governed by the Indian article 59 (corresponding to our article 41) and not by the Indian article 60: *Icha Dhanji* v. *Natha*, I.L.R. 13 Bombay 338; *Dharam Das* v. *Ganga Devi*, I.L.R. 29 All. 773.